**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **FRANCIS JAMES LEVRET**<br>Claimant | ) | |
| VS. | ) | |
| **MXI EXPRESS, INC.**<br>Respondent | ) | Docket No. 1,019,920 |
| AND | ) | |
| **ZURICH AMERICAN INSURANCE CO.**<br>Insurance Carrier | ) | |

## ORDER

Claimant requested review of the June 15, 2006, Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on September 26, 2006.

### APPEARANCES

Bruce Alan Brumley, of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record listed in the Award. The Board has also adopted stipulations No. 1 through 6 as listed in the Award. However, the Board notes that contrary to stipulation No. 7 listed in the award, the claimant is asking for payment of additional temporary total disability benefits from the date of the accident through June 9, 2005. Claimant enunciated this request at the Regular Hearing.[1] During oral argument to the Board, counsel for respondent agreed that should this claim be found compensable, claimant is entitled to these additional weeks of temporary total disability compensation.

[1]R.H. Trans. (Feb. 23, 2006) at 9-10.

## ISSUES

The Administrative Law Judge (ALJ) found that claimant had not met his burden of proving that he had sustained an injury in Kansas arising out of and in the course of his employment with respondent. The ALJ found the testimony of Dr. Lowry Jones, Jr., to be more credible than the testimony of Dr. Travis Oller on the question of whether claimant would have been able to drive his truck from Illinois to Kansas after having sustained a rotator cuff tear. Accordingly, the ALJ awarded no benefits to claimant.

Claimant states that the standard of proof is a preponderance of the evidence. He argues he is not required to show clear and convincing evidence or beyond a reasonable doubt that the accident happened as he stated but only has to prove that the scales are tipped slightly in his favor. He claims that it is 51 percent likely that the material facts are in his favor. He further contends that given this simple standard of proof, he has proven the accident happened in Kansas as he has stated. He, therefore, asserts that he is entitled to workers compensation benefits and requests temporary total disability compensation from March 22, 2005, to June 9, 2005; payment of his medical bills stipulated to by the parties; an award of 22 percent permanent partial disability to his right shoulder, which is a split of the ratings of Dr. Oller and Dr. Jones; and future medical and unauthorized medical expenses.

Respondent argues that claimant has not proven that it is more probably true than not that he injured his right shoulder on September 4, 2004, by accident in Kansas arising out of and in the course of his employment. Respondent further notes that this claim has been before the Board on two previous occasions and claimant has been denied benefits both times. Respondent argues that the facts of the case are essentially unchanged from when the claim was reviewed and denied. Accordingly, respondent requests that the Board affirm the ALJ's award.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This case has been before the Board on two previous occasions. On January 31, 2005, the ALJ granted claimant's request for medical treatment. Respondent appealed, claiming lack of jurisdiction because the accident occurred in Illinois, lack of timely notice, and failure to prove an accidental injury arising out of and in the course of employment. The Board set out the facts as follows:

> Claimant was employed as an over-the-road truck driver. Respondent's home base is in Virginia and claimant began his last load for respondent from New Jersey. When he delivered the goods to a customer in Chicago, Illinois, on August

30, 2004, claimant testified that he hurt his right shoulder. He did not contact his employer at that time and continued on his route.

Then, on September 4, 2004, claimant arrived in Hiawatha, Kansas. As he was at the end of his driving day, he elected to spend the night with a friend, Doris Shopteese. According to claimant, he was getting out of his truck at Ms. Shopteese's home, when he slipped and fell to the ground. He claims he hit his head and neck and landed on his right shoulder. He did not contact his employer at that time. The same day, claimant went to the emergency room in Topeka, Kansas and sought treatment for shoulder complaints. The medical record from this visit reflects a diagnosis of shoulder pain and does not include any history of injury. Claimant was referred to a local orthopaedic physician for follow-up.

After visiting the emergency room, he waited a few days then contacted Chris Widener, his dispatcher, in Virginia on September 7, 2004. According to claimant, he told Mr. Widener of his injury and was referred to Stan Farhy. Claimant then called Mr. Farhy and told him of his injury. Claimant cannot recall precisely what he told Mr. Farhy. He generally recalls telling him of the events that occurred in Chicago, Illinois, explaining the right shoulder injury, but he doesn't recall whether he told Mr. Farhy about the fall from his truck in Hiawatha, Kansas. [Footnote citing P.H. Trans. (Jan. 19, 2005) at 24-25]. He only remembers telling Mr. Farhy that he was injured.

Both Chris Widener and Stan Farhy testified by deposition. Mr. Widener testified that claimant called in on September 7, 2004, and informed him that he had been hurt on August 30, 2004 while in Chicago. Mr. Widener asked claimant why he was just now informing him of this incident, and claimant told him that it wasn't giving him problems. At no time during this conversation did claimant disclose an accidental injury in Hiawatha, Kansas.

Mr. Farhy testified that claimant called him on September 7, 2004. He indicated that claimant told him that while he was picking up a load in Chicago on August 30th and preparing to leave he had to climb up and pull a roll bar down, and as he was doing that he slipped and pulled him *[sic]* arm out of joint. [Footnote citing Farhy Depo. at 5]. Claimant informed Mr. Farhy he had already been seen by a doctor. According to Mr. Farhy, claimant did not mention any accident in Hiawatha, Kansas on September 4, 2004.

. . . .

On September 8, 2004, claimant was seen by Dr. Kenneth Teter. Dr. Teter's record indicates claimant's shoulder injury occurred when claimant "fell out of the back of a trailer on 8-27-04" when claimant "caught himself with his right arm extended." [Footnote citing P.H. Trans. (Jan. 19, 2005), Resp. Ex. A]. There is no mention in this record of any accident or fall on September 4, 2004.

Around September 10th, Doris Shopteese contacted Mr. Farhy and told him that claimant's accident did not happen as he says. She indicated that claimant was

trying to file a false workers compensation claim and asked her to lie about where he was injured. This sparked Mr. Farhy to turn this information over to the insurance company for an investigation.

In Ms. Shopteese's deposition she relayed her version of how claimant was injured:

> A. He [claimant] pulled in the drive, got out of the truck, came into the house to check to see what I was cooking, commented that the pork chops looked very well, and he said that they looked very professional. And I asked him, Did you get my cigarettes? And he said, Oh, yes, I did, let me go out and go get them. So he went back out to get them. And I turned the fire down.
>
> As I was walking back to the living room – or the dining room, I peeked out the window, and I seen Jim [claimant] on the steps of the truck with a sack in his hand which had the cigarettes in them, and he was shaking back and forth saying, Whoa, baby, I'm happy to be home.
>
> Q. Okay. What happened after that?
>
> A. He fell off the top of the step.
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> Q. He fell off of his truck?
>
> A. Yeah. He was on the top step with the door shut.
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> Q. And this was after he had already arrived, been in the house and had gone back to the truck; is that correct?
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> A. Yes.
>
> Q. Okay. Did he mention anything about hurting himself when he fell from the truck?
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> A. I ran out and checked on him, and he was covered with rocks and pebbles, because my driveway is rocks, and I brushed them off from him, and I asked him if he was okay. And he said that his shoulder was kind of hurting but that it would be okay. [Footnote citing Shopteese Depo. at 5-7].

Ms. Shopteese stated that she went out, and helped claimant up, and suggested that he see a doctor, but claimant would not go. She indicated that claimant told her if his job ever called her she was to remember that he was hurt in Chicago. [Footnote citing Shopteese Depo. at 8]. Ms. Shopteese states her reason for calling Mr. Farhy was because claimant had been taking Demerol and then going out and driving his truck, and she was concerned that claimant should not be

driving and wanted to check with his supervisor. It is clear from the record that claimant and Ms. Shopteese have had a parting of the ways and her motives may be less than altruistic. In fact, the claimant's landlord, Pama Bruce, testified that Ms. Shopteese has been the source of ongoing disturbances at the hotel where he has been residing.

Claimant was last seen by Dr. Kimball Stacey on December 23, 2004, at his lawyer's request. Dr. Stacey's report indicates claimant was injured on October 7, 2004 [Footnote: This appears to be an error. Claimant does not know why October is referenced as he maintains he told Dr. Stacey of the September 4, 2004 accident.] when he fell from the cab of his tractor trailer onto the ground. Claimant denied "any prior symptoms, injuries or accidents similar to those described" in his report. [Footnote citing P.H. Trans. (Jan. 19, 2005), Cl. Ex. 1, at 2]. Dr. Stacey's report indicates that immediately after the accident, claimant initially complained of severe pain in his neck and right shoulder, confusion and stiffness in his upper back. Dr. Stacey opined that claimant's injuries were due to his work-related accident. He recommended claimant have an MRI done for his right shoulder and that he see an orthopedic physician.

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Not surprisingly, claimant argues that the August 30, 2004 accident was inconsequential, and that it was the subsequent injury of September 4, 2004 that caused his significant right shoulder complaints as well as the plethora of other bodily complaints he now asserts. Claimant alleges it was the September 4, 2004 accident that arose out of and in the course of his employment that has given rise to his present need for treatment. The difficulty with this argument is that claimant repeatedly failed to mention the existence of the September 4, 2004 accident when seeking medical treatment and when informing his superiors of his injury. Moreover, the record indicates claimant did not give notice of a September 4, 2004 accident.

When claimant first sought treatment from the ER, he disclosed only a shoulder injury and there is no documentation about his history of injury contained within the record. When he called his superiors at the company, they indicate he only advised them of the injury occurring in Chicago, Illinois, and made no mention of the accident on September 4, 2004 in Hiawatha, Kansas. In fact, claimant has no clear recollection of what he told these gentlemen, although he admits generally disclosing the event in Chicago, Illinois. When he presented for further treatment with Dr. Teter on September 8, 2004, he referenced an accident on August 27, not August 30 or September 4, 2004. When claimant saw Dr. Stacey he apparently disclosed an accident date, but Dr. Stacey's report reveals October 7, 2004 as the accident date, and reports that claimant *denied* any other prior symptoms, injuries or accidents similar to those he was presently complaining of.[2]

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[2] *Levret v. MXI Express, Inc.*, No. 1,019,920, 2005 WL 1046572 (Kan. WCAB Apr. 28, 2005).

The Board, in its Order of April 28, 2005, found that the evidence in the record to that point failed to show that claimant provided the statutorily required notice for the September 4, 2004, accident. Accordingly, the Board reversed the January 31, 2005, Order of the ALJ.

A second preliminary hearing was held on June 8, 2005. At that hearing, claimant introduced a copy of a letter Ms. Shopteese wrote respondent in September 2004. The document displays a September 16, 2004, date from a fax machine and indicates that Ms. Shopteese contacted respondent on September 15, 2004, with information about claimant and his plan to collect money by claiming an injury in Chicago, Illinois. The letter also contained information about claimant's fall from the cab of his truck the day he arrived in Hiawatha.

The ALJ found that this letter constituted timely notice to respondent of claimant's September 4, 2004, accident. The ALJ found that neither claimant nor Ms. Shopteese were credible. However, the ALJ found that it was unlikely that claimant would have been able to continue his duties as a truck driver for a week after suffering a full thickness rotator cuff tear of the right upper extremity. The ALJ found that even if there was an injury in Illinois, there was an aggravation of that injury because of the fall in Kansas. Accordingly, the ALJ found that claimant met with personal injury by accident which arose out of and in the course of employment.

Respondent appealed this Order to the Board. The Board agreed with the ALJ that respondent had timely notice of the September 4, 2004, injury. The Board further found:

> Nonetheless, claimant has failed to prove it is more probably true than not that he injured his right arm or shoulder on September 4, 2004, when he allegedly fell from the steps of his truck.
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> . . . .
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> In the first preliminary hearing Order, the Judge commented that "[c]laimant's own words are so conflicting as to cast doubt upon his credibility." [Footnote citing ALJ Order (Jan. 31, 2005) at 1.] And in the June 10, 2005, Order, the Judge stated "[t]he Court does not find that either witness to the September 4 accident – the Claimant and Ms. Shopteese – to be credible." [Footnote citing ALJ Order (June 10, 2005) at 1.] Similarly, at this juncture of the claim the Board is not persuaded that claimant fell on September 4, 2004, or that he sustained personal injury due to an accident that occurred in Kansas that arose out of and in the course of his employment with respondent. Accordingly, the June 10, 2005, preliminary hearing Order should be reversed.[3]

[3] *Levret v. MXI Express, Inc.*, No. 1,019,920, 2005 WL 2181254 (Kan. WCAB Aug. 12, 2005).

After the Board's August 12, 2005, Order, claimant took the deposition of Lisa Cole, apparently to bolster his claim that he was injured on September 4, 2004, in Hiawatha. Ms. Cole knows claimant and Ms. Shopteese. Claimant is her aunt's father-in-law, and Ms. Shopteese lives just down the block. Ms. Cole said that sometime in September 2004, Ms. Shopteese went to Ms. Cole's father's house and asked for her father's help because claimant had fallen off his truck and needed help putting up an antenna. Ms. Cole's father was not available. About a week after that, Ms. Cole drove claimant to Kansas City to pick up someone from the airport, and claimant was wearing a sling and told her about his injury. Ms. Cole admitted she did not witness claimant falling from his truck. She knew about his injury only because he told her.

Claimant testified again at a deposition as part of the regular hearing on May 30, 2006. Although his testimony is basically the same as his testimony in the previous preliminary hearing of January 19, 2005, he did attempt to explain the inconsistencies in the dates of accidents set out in the medical records. In responding to a question of why the emergency room records indicate an accident date of August 27, claimant replied he was in pain at that time and just did not care what date it was. He described to the doctor what happened when he fell off the truck on September 4 as well as what happened in Chicago on August 27. He had no idea why the doctor reported the date of injury as August 27.

When asked why Dr. Jones testified that claimant only told him about injuring his shoulder on one occasion, claimant said that he was nervous and he and the doctor talked about many things. Claimant could not remember if he only mentioned one injury but said there was a lot of conversation, not all of which was about his injury. He said, however, that when he told Dr. Jones about driving 1,000 miles after the injury, he meant after the Chicago injury.

Claimant did not know why Dr. Teter's initial records show that he only advised him that he had been hurt in Chicago. He said that when he went to the doctor, his main concern was getting his arm taken care of, not where and when he was hurt. He said he is very bad with dates and cannot even remember his parents' birth dates.

Depositions were also taken of Dr. Jones and Dr. Oller. Dr. Jones, a board certified orthopedic surgeon, first examined claimant on March 22, 2005. Claimant's primary complaint was his right shoulder. Dr. Jones testified that claimant told him he initially hurt his shoulder on September 8, 2004. Claimant only told Dr. Jones about a single accident. Claimant reported that he continued to work following that fall. Claimant said he finished his route, driving approximately 1,000 miles. Claimant testified that he drove after his minor accident in Chicago, but he was unable to drive after his fall in Hiawatha because he would have been unable to shift the gears of his truck. Dr. Jones testified, however, that he believed claimant would have been able to drive 1,000 after suffering his injury. He said that claimant's primary difficulty would have been in lifting overhead and that claimant

would have been able to shift the gears of his truck. Dr. Jones claimed to have other patients who were truckers who drove multitudes of miles after an injury.

As a result of his examination, Dr. Jones recommended an MRI scan of claimant's right shoulder. The MRI showed a tear of claimant's rotator cuff and a defect of his biceps tendon. Dr. Jones performed an arthroscopic evaluation of claimant's shoulder and repair of his rotator cuff surgery on April 18, 2005. After surgery, Dr. Jones recommended physical therapy. Dr. Jones last saw claimant on August 23, 2005, at which time he was at maximum medical improvement. Based on the AMA *Guides*[4], Dr. Jones found that claimant had a 20 percent permanent partial disability to his right shoulder.

Travis Oller, D.C., saw claimant on November 17, 2005, at the request of claimant's attorney. Dr. Oller's report indicates that claimant told him he was injured on September 4, 2004. His report also indicates that claimant told him he had no prior injuries or accidents. However, in his deposition, Dr. Olller stated that his report failed to mention an injury claimant had on August 27, 2004, in Chicago. But Dr. Oller stated that claimant told him the injury was very minor and he was able to drive his truck after that incident.

Dr. Oller testified that given claimant's injuries, he would not have been able to drive his truck after the fall from his truck because his rotator cuff tear would have prevented him from moving his right arm in any range and would not have allowed him to operate the stick shift in the truck. If the injury had happened on August 27 in Chicago, claimant would not have been able to drive his truck from that date until September 4, 2004.

Based on the AMA *Guides*, Dr. Oller found that claimant had a 20 percent right upper extremity impairment due to loss of right shoulder active range of motion, as well as a 5 percent right upper extremity impairment due to a right acromial clavicular joint crepitus, for a total of a 24 percent right upper extremity impairment. Dr. Oller opined that claimant's injury was 100 percent related to his fall from his truck on September 4, 2004.

In denying claimant's request for compensation, the ALJ referred to his June 10, 2005, preliminary hearing Order in which he had concluded it was unlikely that claimant suffered the rotator cuff tear in Illinois because he would have not been able to use his arm to drive to Kansas after the injury. In his Award, the ALJ stated:

> Since then, two medical opinions have been provided regarding this issue. Dr. Oller, a chiropractor, testified that had the Claimant suffered the full thickness rotator cuff tear in Illinois that he would have been unable to drive back to Kansas. The better opinion came from Dr. Jones, who testified he has considerable experience with such injuries in truck drivers, and the rotator cuff tear would have

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

prevented the Claimant from working overhead with that arm, but would not have hindered him from driving a truck.[5]

The ALJ further stated:

> The Court finds it impossible to reconcile the Claimant's testimony, the medical evidence, the testimony of Mr. Farhy and Mr. Widener, and the testimony of Ms. Shopteese, into any reasonable, coherent fact situation that would support the Claimant's allegation. The Court finds the Claimant has not met his burden of proof.[6]

The Board agrees with the ALJ's conclusion that the testimony cannot be reconciled and claimant has failed to meet his burden of proof.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 15, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of October, 2006.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier

[5] ALJ Award (June 15, 2006) at 3-4.

[6] *Id.* at 4.